

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

VENTURA UNIFIED SCHOOL DISTRICT,

Respondent.

OAH CASE No. N2006100763

**ORDER AS TO PETITIONER'S
MOTION TO STAY PUT**

On October 23, 2006, the Office of Administrative Hearings (OAH) received from attorney Carol Hickman Graham a Request for Due Process Hearing (Complaint) on behalf of Student, naming Ventura Unified School District (District) as Respondent.

On January 17, 2007, Student filed a Stay Put request to attend Junipero Serra Elementary School, pursuant to the May 19, 2005 Individualized Education Program (IEP).¹ OAH issued a Notice of Motion on January 22, 2007, which gave Respondent five business days to file a response to Student's Stay Put request. On January 29, 2007, OAH received a timely response from attorney Justin R. Shinnfield on behalf of the District. The District contends that Student's Stay Put placement is the parties' January 3, 2007 Interim Agreement.

APPLICABLE LAW

Statements, including written agreements, made during mediation are confidential and not disclosable in an administrative proceeding, unless otherwise provided by law. (Evid. Code § 1119.) Evidence Code section 1123 provides that written agreements made pursuant to mediation are admissible under the following conditions:

- (a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.

¹ On January 16, 2007, OAH ordered Student to refile the January 9, 2007 Stay Put request because the motion contained confidential mediation discussions.

(b) The agreement provides that it is enforceable or binding or words to that effect.

(c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure.

(d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

Pursuant to Evidence Code section 1123, subdivision (b), an agreement is binding upon the parties if the agreement clearly states the parties' intention to be bound by the agreement. (*Fair v. Bakhtiari* (2006) 40 Cal. 4th 189, 197.)

Title 20 United States Code section 1415(j)² provides: "Except as provided in subsection (k)(4) [concerning student disciplinary proceedings], during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed."

34 Code of Federal Regulations part 300.518(a) (2006) provides: "(a) Except as provided in . . . [the regulation concerning student disciplinary proceedings], during the pendency of any . . . proceeding regarding a [request for a due process hearing], unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement. [¶] (b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents must be placed in the public school until the completion of all proceedings."

Education Code section 56505(d), provides: ". . . [D]uring the pendency of the hearing proceedings, including the actual state-level hearing, or judicial proceeding regarding a due process hearing, the pupil shall remain in his or her present placement, except as provided in . . . [the federal regulation concerning student disciplinary proceedings], unless the public agency and the parent or guardian agree otherwise. A pupil applying for initial admission to a public school shall, with the consent of his or her parent or guardian, be placed in the public school program until all proceedings have been completed. . ."

The stay put provision of the Individuals with Disabilities Education Act has been interpreted to function as an automatic statutory injunction against changing a child's then-existing "educational placement" or "present placement," pending the resolution of a dispute between the school district and the parents regarding the child's educational program. (*Casey K. v. St. Anne Community High School District No. 302* (7th Cir. 1998) 400 F.3d 508, 511.) The federal act and its regulations do not provide a definition for "educational placement."

² All statutory citations are to Title 20 United States Code, unless otherwise noted.

For purposes of stay put, a student's "current educational placement" is typically the placement called for by the student's IEP that has been implemented prior to the due process hearing request. (*Thomas v. Cincinnati Board of Education* (6th Cir. 1990) 918 F.2d 618, 625.)

DISCUSSION

Before Student filed the Due Process Complaint, Student's last agreed educational placement was the May 19, 2005 IEP. However, the parties' January 3, 2007 Interim Agreement constitutes an agreement otherwise to modify Student's educational placement. The Interim Agreement explicitly provides for Student's educational placement during the pendency of the Due Process Complaint at Sunset Elementary pursuant to the October 19, 2006 IEP. The Interim Agreement meets the disclosure requirements of Evidence Code section 1123, subdivisions (a) and (b), because the document provides for the disclosure of the Agreement for purposes of implementation, and a promise to be bound by the terms of the Agreement.

ORDER

Petitioner's Motion for Stay Put is denied.

Dated: February 2, 2007

PETER PAUL CASTILLO
Administrative Law Judge
Special Education Division
Office of Administrative Hearings